General Die Casters, Inc. *and* Teamsters Local 24 a/w International Brotherhood of Teamsters. Cases 08–CA–039211, 08–CA-039228, 08–CA–039252, 08–CA–039256, 08–CA–039266, and 08–CA–039272

July 25, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND GRIFFIN

On July 11, 2011, Administrative Law Judge Mark Carissimi issued the attached decision. The Acting General Counsel and the Respondent filed exceptions and supporting briefs. The Acting General Counsel and the Respondent also filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

In particular, we agree with the judge that the Respondent violated employee Ivery's *Weingarten* right to the presence of a union representative at an investigatory interview. *NLRB v. J. Weingarten,* 420 U.S. 251 (1975). Two senior managers summoned Ivery to a meeting where they presented him with a disciplinary notice related to inaccurate timecard entries. In the course of their discussion, Plant Manager Brian Lennon warned Ivery about making any similar mistakes, stating, "[W]e've fired people for this in the past, and you're, you're getting a verbal warning." Lennon then raised an unrelated aspect of Ivery's conduct that bothered management. Although Ivery twice asked whether he needed "to get somebody in here," Lennon responded that he did not. During the discussion that followed, Lennon repeatedly asked Ivery why he engaged in the described conduct and referred to the recurrence of "traits that have got you in trouble in the past." Lennon also mentioned "problems" that Lennon needed to address and that Ivery needed to correct. Based on our review of the audio recording and the transcript of the meeting, we agree with the judge that Ivery could reasonably have feared that his responses to Lennon's questions could be used against him, i.e., that the meeting was investigatory.[3]

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There were no exceptions to the judge's findings that the Respondent did not violate Sec. 8(a)(4), (3), and (1), as to employee Jerome Ivery, by assigning him more onerous work, by subjecting him to closer supervision and otherwise harassing him by communicating with him in a hostile manner, by issuing him disciplinary warnings, or by threatening him with discipline or discharge. Nor were exceptions filed to the judge's finding that the Respondent did not violate Sec. 8(a)(4), (3), and (1) by placing employee Leonard Reed on probation.

[2] The Respondent provided its employee witnesses paid leave for the overnight shift preceding their scheduled testimony while providing the Acting General Counsel's witness, employee Sam Tomsello, unpaid leave for the overnight shift following his testimony. Member Griffin agrees with his colleagues that the Respondent's conduct did not violate the Act, but regards that conduct to be at the outer limits of permissibility. Under *General Electric Co.*, 230 NLRB 683 (1977), the Board considers witness fees to be a matter between the witness and the party that seeks the witness' testimony. Parties to a proceeding may therefore set their own witness fees, even if the result is that employees testifying for a respondent receive higher witness fees than employees testifying for the General Counsel, so long as those payments are reasonable and do not implicate benefits related to the employment relationship. Further, an employer may pay an employee's witness fee in the form of wages the employee would lose as a result of testifying (or to compensate the employee for attending the hearing).

Here, however, the Respondent provided its witnesses paid leave for a shift that did not directly conflict or overlap with their scheduled testimony. Moreover, the Respondent's witnesses were relieved of working the shift before their testimony; in contrast, Tomsello worked all night before testifying and then requested unpaid leave for the following shift because he was too tired to work. Finally, the dollar value of a full shift's paid leave for the Respondent's witnesses (assuming their wages are similar to Tomsello's) appears to be approximately three times the value of the witness fee that Tomsello would have received from the Acting General Counsel, a differential that is at least arguably unreasonable. Considered together, these facts demonstrate that the Respondent treated its own witnesses substantially more favorably than Tomsello, and in a manner that arguably implicates terms and conditions of the employment relationship.

Nevertheless, Tomsello received precisely what he requested from the Respondent—unpaid leave for the shift after his testimony—and he was not unlawfully forced to use his vacation time. See *Western Clinical Laboratory, Inc.*, 225 NLRB 725 (1976), enfd. 571 F.2d 457 (9th Cir. 1978). Moreover, because Tomsello's testimony preceded that of the Respondent's witnesses, this case does not present the facial disparity of Tomsello's requesting and being denied a benefit that the Respondent had provided to its own employee witnesses. In view of these facts, Member Griffin agrees with the dismissal of the relevant allegations.

[3] Contrary to his colleagues, Member Hayes would reverse the judge's finding that the Respondent violated Sec. 8(a)(1) by denying employee Ivery his right to a union representative under *NLRB* v. *J. Weingarten,* 420 U.S. 251 (1975). In *Weingarten*, the Supreme Court held that Sec. 7 "guarantees an employee's right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres." Id. at 262. The meeting in question was not investigatory. It involved the predetermined imposition of discipline on Ivery and subsequent discussion of a second, unrelated performance issue for which Ivery was specifically told he was not "in

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, General Die Casters, Peninsula and Twinsburg, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. July 25, 2012

Mark Gaston Pearce, Chairman

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Gina Fraternali and *Susan Fernandez, Esqs.,* for the Acting General Counsel.

Ronald Mason and *Aaron Tulencik, Esqs.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Cleveland, Ohio, on March 14, 15, and 16, 2011. On January 20, 2011, an amended consolidated complaint and notice of hearing (the complaint) issued against General Die Casters, Inc. (the Respondent) based on charges and amended charges filed by Teamsters Local 24 a/w International Brotherhood. of Teamsters (the Union).[1]

On March 14, 2011, the Regional Director for Region 8 issued an order withdrawing certain charge allegations and a paragraph of the complaint. After the issuance of the complaint in this matter, based on a private agreement between former employee Mark Albright and the Respondent, the Union requested withdrawal of certain charge allegations that were related to Albright. Accordingly, the Regional Director approved the withdrawal of Case–08–CA–0392660, and the allegations relating to Albright in Cases 8–CA–39211 and 08–CA–039228. The Regional Director also withdrew paragraph 9 of the complaint which relates to Albright.

As amended at the hearing,[2] paragraph 8 of the complaint alleges that the Respondent violated Section 8(a)(4), (3), and (1) by: since about October 1, 2010, assigning more onerous job duties to employees Jerome Ivery; since about October 1, 2010, and on various dates thereafter, including November 1, 2010, engaging in closer supervision of Ivery and otherwise harassing him by communicating with him in a hostile manner; on or about November 1, 2010, issuing a verbal warning to Ivery, and denying him his *Weingarten* rights; and on December 9, 2010, issuing Ivery a written warning. Paragraph 10 of the complaint alleges that the Respondent placed employee Leonard Redd on 6 months probation on November 12, 2010, in violation of Section 8 (a)(4), (3), and (1) of the Act. Paragraph 11 of the

trouble." See *Stewart-Warner Corp.*, 253 NLRB 136, 147 (1980) (finding no reasonable fear of discipline where employee asked manager if he faced discipline and was told, "No, we just want to talk"), enfd. mem. sub nom. *Bernstein v. NLRB*, 676 F.2d 699 (7th Cir. 1982).

[1] The charge in Case 08–CA–039211 was filed on October 28, 2010, and an amended charge was filed on November 2, 2010. The charge in Case 08–CA–039228 was filed on November 16, 2010. The charge in Case 08–CA–039252 was filed on December 6, 2010, and amended charge was filed on December 8, 2010, and a second amended charge was filed on December 29, 2010. The charge in Case 08–CA–039256 was filed on December 10, 2010. The charge in Case 08–CA–039266 was filed on December 17, 2010, an amended charge was filed on December 29, 2010, and the second amended charge was filed on January 13, 2011. The charge in Case0 8–CA–039272 was filed on December 20, 2010.

[2] At the hearing, counsel for the Acting General Counsel moved to amend par. 8(B) to read as follows: "Since about October 1, 2010, and on various dates thereafter, including November 1, 2010, Respondent engaged in closer supervision of its employee Jerome Ivery and otherwise harassed him by communicating in a hostile manner." Counsel for the Acting General Counsel also moved to amend paragraph 8 (C) as follows: "On about November 1, 2010, Respondent issued a verbal warning to its employee Jerome Ivery and denied Jerome Ivery his *Weingarten* rights." (GC Exh. 1(jj).) The substantive change in par. 8(B) was the addition of the date November 1, 2010. In par. (C) the substantive change was to include the allegation that Ivery was denied his *Weingarten* rights.

The Respondent's counsel objected to the amendment stating that the evidence underlying the amendments was an audio recording that was provided to the Acting General Counsel in December 2010, and that those allegations should have been made in the original complaint. In response, counsel for the Acting General Counsel stated that she did not receive the email, including the attached audio recording, which the Respondent's counsel had submitted in December 2010, because of the size of the attachment. The NLRB's email system could not transmit a file that large. In discussions with the Respondent's counsel the week before the trial, this issue surfaced. Respondent's counsel then submitted the audio recording in a manner which the NLRB's email system could handle. After reviewing the audio recording, on March 9, 2011, the Regional Director decided to amend the complaint to allege that a *Weingarten* violation had occurred at the November 1, 2010 meeting and the Respondent's counsel was notified on the same date..

Under these circumstances, at the hearing, I permitted the amendments to the complaint. With respect to the amendment to par. 8(B), the inclusion of the date of November 1, 2010, only adds greater specificity to the allegation. With respect to par. 8(C), as soon as the Regional Director actually received the audio recording the week before the trial, and it was reviewed and any decision was made to amend the complaint and the Respondent's counsel was notified. Sec. 102.17 of the Board's Rules and Regulations permit complaint amendments upon terms that may be just. The amendments to the complaint sought by counsel for the Acting General Counsel are sufficiently related to the existing allegations so that the Respondent is not prejudiced by permitting the amendments. The Board's policy permits amendments under these circumstances. See *Payless Drug. Stores*, 313 NLRB 1220 (1994).

complaint alleges that a Respondent violated Section 8(a)(1), (3), (4), and (5) of the Act by unilaterally implementing on or about November 19, 2010, a new benefit for third-shift employees related to their testifying on its behalf at an unfair labor practice hearing and not affording that same benefit to a third-shift employee who supported the Union and testified at the same hearing for the Acting General Counsel.

On the entire record,[3] including my observation of the demeanor of the witnesses,[4] and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the manufacture of aluminum die castings at its facilities located in Twinsburg and Peninsula, Ohio, where it annually sells and ships products valued in excess of $50,000 directly to points located outside the State of Ohio. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

I conducted a trial in a previous case involving the Respondent, Case 08–CA–037932, et al, on October 18 and 19, November 8, 9, 10, 15, 17, 18, and 19, and December 15 and 16, 2010. I issued the decision in that case, *General Die Casters, Inc.,* JD–26–11, on May 2, 2011. In the decision, I found that the Respondent committed a number of violations of Section 8(a)(1)(3) and (5) of the Act. I also dismissed several complaint allegations. In that decision I explained in some detail the Respondent's operations and its history of bargaining with the Union. For the sake of brevity, I will not repeat that discussion, although I will refer to issues raised in the previous case that are necessary to resolve the issues presented in this case. Since it is a necessary predicate to addressing the allegations that the Respondent made an unlawful unilateral change in violation of Section 8(a)(5) and (1) of the Act regarding this payment of wages to employees who testified at the prior hearing and that it violated an employee's *Weingarten* rights, I note that the Union has been the certified representative of the Respondent's production and maintenance employees since August 28, 2008.

The Allegations Involving Jerome Ivery

Jerome Ivery is a current employee of the Respondent and has worked there for approximately 31 years. He is a cast trim developer who works on the first shift at the Respondent's Peninsula facility. There are two important aspects of Ivery's duties. One is to "develop" jobs on a die cast machine. This involves using a computer to set the proper specifications for the die cast machine to perform a particular job. The other important task is to "set up" the die cast machine. This involves the placement of the die into the die cast machine. Some of the largest dies can weigh up to 10,000 pounds. As I indicated in my earlier decision, this process is accomplished by the use of an electrical hoist and chains which are attached to the die.

In my decision in *General Die Casters, Inc*., JD–26–11, I found that Ivery was an early supporter of the Union when it began its campaign to organize the Respondent's employees in December 2007. He openly acknowledged his union support to the Peninsula plant manager, Brian Lennon, in the early part of 2008. He continued to support the Union until approximately November 2009 when he announced to Die Cast Superintendent Charles Long that he no longer supported the Union.

By September 2010, Ivery again began to support the Union and met with counsel for the Acting General Counsel in preparation for the trial in the first case. In September 2010, Ivery was subjected to a course of interviews by certain supervisors of the Respondent and the Respondent's counsel that did not comply with the Board's requirements for such interviews as set forth in *Johnnie's Poultry Co*., 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). Accordingly, I found the Respondent's conduct to violate Section 8(a)(1) of the Act.

On October 18 and 19, 2010, Ivery testified at trial in the first case on behalf of the Acting General Counsel. It is clearly established that at the time of the alleged discrimination against him in the instant case, Ivery was a known union supporter who testified against the Respondent at the first trial. In my decision in *General Die Casters, Inc*., supra, I found that the Respondent had committed a number of violations of Section 8(a)(3) and (1) of the Act. Thus, with respect to the 8(a)(4), (3), and (1) allegations in the instant case, the Acting General Counsel has established a prima facie case with respect to all of the complaint allegations specifically involving Ivery under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. (1983). In *Gary Enterprises*, 300 NLRB 1111 (1990), the Board indicated that it applied its *Wright Line* analysis in cases involving alleged violations of Section 8(a)(4). Accordingly, it is the Respondent's burden to produce evidence with respect to each complaint allegation establishing that it would have taken the same action against Ivery if he had not engaged in activities protected by the Act.

[3] On March 30, 2011, I issued an order reopening hearing and admitting GC Exhs. 45 through 51 into evidence pursuant to an unopposed motion filed by counsel for the Acting General Counsel. The Respondent provided these documents to the Acting General Counsel following the close of the hearing.

[4] In making my findings regarding the credibility of witnesses, I consider their demeanor, the content of the testimony and the inherent probabilities based on the record as a whole. In certain instances, I credited some, but not all of what the witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions and to believe some and not all of the witness' testimony. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d. 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). See also *J. Shaw Associates*, *LLC*, 349 NLRB 939, 939–940 (2007).

The Allegation Regarding More Onerous Working Conditions

Paragraph 8(a) of the complaint alleges that since on or about October 1, 2010, the Respondent assigned more onerous job duties to Ivery in violation of Section 8(a)(4), (3), and (1) of the Act.

In the first case, I dismissed an allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by imposing on Ivery more onerous duties by assigning him more frequent set up assignments to perform by himself. *General Die Casters*, supra at slip op. pps. 43–46. In essence, I found that performing setup assignments alone was a regular part of Ivery's duties and that the evidence established that such assignments were not discriminatorily motivated and were made in the ordinary course of the Respondent's business.

In the instant case, the Acting General Counsel again makes the allegation that the Respondent discriminatorily assigned Ivery to perform work by himself that is normally performed by two employees. In support of this allegation the Acting General Counsel relies principally on the testimony of Ivery. After testifying at the first trial on October 18 and 19, 2010, Ivery took some time off and returned to work on October 25, 2010. Ivery testified that on October 27, 2010, setup man Marshall Hamric and a trainee were setting up die cast machine 16. Supervisor Mike Jordan reassigned those two employees to another task and directed Ivery to perform the setup work on that machine by himself (Tr. 159–160). In November 2010, Hamric and another employee had started the setup of machine 7, when Jordan reassigned them to sweep floors and assigned Ivery to the setup (Tr. 160–161). In February 2011, Ivery was assigned by Jordan to remove a die from machine 6 by himself. When Ivery asked Jordan if he was going to have any help, Jordan responded that he did not have anyone else available. According to Ivery, later that day Hamric and another employee put the new die into the same machine (Tr. 160–161). On approximately February 17, 2011, Jordan assigned Ivery to change the tip of machine 16, together with the machine operator. When the operator left, apparently to go to lunch, Ivery asked Hamric, who was working close by, to assist him and Hamric did so. (Tr. 163–164.) Ivery testified that as long as he has been employed by the Respondent, the setup of diecast machines has always been a two-person job (Tr. 162).

Ivery also testified in February 2011, he was assigned to develop two machines by himself without a "process guy" to help. When Ivery asked Jordan for assistance, Jordan told Ivery that the "process guy" was busy (Tr. 164–166). Ivery had a practice of noting on his timecards situations when he was assigned a task that he believed should have been a two-person assignment by writing "BM" which stands for "by myself." Timecards of Ivery that were introduced into evidence, established that Ivery developed jobs without a "process" employee on several occasions in December 2010 (GC Exhs. 38, 40, 42, and 43).

In defense of this allegation, the Respondent contends that performing setups on some die cast machines and developing jobs often are assigned to one employee in the regular course of business. Die Cast Superintendent Charles Long testified that the decision to assign one or two employees to set up a die cast machine is based on a number of factors, including safety considerations involving the complexity and size of the die and the necessity to have the die installed quickly to meet customer needs. In this connection, Long testified that while one employee may be able to safely install a die, if a die needed to be installed expeditiously to meet customer demands, two employees would be assigned in order to perform the setup more quickly. Long testified that the other two setup employees on the first shift, Marshall Hamric and Charles Cooper, also performed setups by themselves during the time material to this complaint. Long candidly admitted, however, that since October 1, 2010, Ivery has been assigned slightly more individual setups than the other employees because of his versatility, experience, and knowledge.

Supervisor Michael Jordan testified that he is primarily responsible for assigning employees to perform setup work but that he consults with Long and Plant Manager Brian Lennon. Jordan testified that the primary consideration in deciding to assign one or two employees to a setup is the priority of the part being cast and the available man power. With respect to the larger dies, Jordan testified that for the most part they can safely be installed or removed by one person but two employees could finish the job faster. Jordan testified without contradiction that Ivery is not the only employee who is assigned to perform setups by himself. In early March 2011, Jordan assigned Paul Shaver to set up machine 22 by himself and also assigned Mark Cooper to set up machine 11 by himself. Jordan indicated that because of ever-changing production demands, employees are often reassigned to different tasks throughout the day. Jordan's uncontroverted testimony establishes that he has assigned other employees to assist Ivery in performing setup work. In March 2011, he assigned Cooper to assist Ivery on machine 3 because of safety considerations and in order to expedite the process. In December 2010, Jordan told Ivery that he would have an employee assist him in setting up machine 13. Ivery replied that he would set up the machine and that the other employee could do the trim set up. Jordan told Ivery that if he needed the other employee to help him with the setup of the machine he could tell him to do so.

Current employee Leonard Redd testified that he observed Marshall Hamric performing a setup by himself in October or November 2010. Redd also testified that he has regularly observed employees performing setup work by themselves. As a towmotor operator, Redd has access to all areas of the production area and is in a unique position to observe the activities of other employees. I credit Redd's testimony on this point as he has no motive to be untruthful.

I credit Ivery's testimony regarding the specific instances he was given sole assignments as it is supported by the notations that Ivery made on his timecards. When asked at the hearing if Ivery requested help on these assignments, Jordan testified generally that he could not specifically recall. I find, therefore, that Ivery's testimony is more reliable on this point. I specifically discredit Ivery's testimony, however, that setups are always a two-person job. In this connection, I found in *General Die Casters*, supra at slip op. p. 45, that before the advent of the Union, Ivery had been assigned to perform setup assignments by himself. I credit the testimony of Long and Jordan that dur-

ing the time material to the instant complaint all three of the employees who perform setup work have been assigned to perform such work without assistance. Their testimony is corroborated by Redd.

The credited evidence establishes that while Ivery has been given individual assignments to perform setup work and develop jobs, such assignments were made in the ordinary course of business and were not based upon Ivery's union activity or his testimony at the first trial which was adverse to the Respondent's position. As I found in the first case, there is undisputed evidence that other employees who perform setup work are, at times, assigned to perform such work without assistance. While I have some concern about the one instance where Ivery was assigned to set up a machine by himself, while the two employees originally assigned to that task were directed to sweep floors, my concern regarding this one instance is overridden by the evidence as a whole on this issue. The frequently changing production demands of the Respondent's operation necessitates that employees are often reassigned to tasks with a greater priority. In addition, Ivery's skill and experience permit him to perform some work that the less skilled employees are not capable handling by themselves. The fact that Jordan offered Ivery assistance on two occasions also supports the finding that Ivery's assignments were not made to punish him for his protected activity. It appears to me that Ivery prefers to perform the job developing aspects of his duties rather than to perform individual setup assignments. Setup assignments are a regular part of his duties, however, and the Respondent has established that the individual assignments made to Ivery were made in the ordinary course of business and were not discriminatorily motivated.

I find the cases relied on by the Acting General Counsel in support of this allegation to be distinguishable. In *Bestway Trucking,* 310 NLRB 651 (1993), a truckdriver, Michael Murphy, was given a particularly difficult route to run. When he was given the assignment, Murphy was told that this assignment would give him a diminished opportunity to write letters protesting working conditions. Under these circumstances, the Board found that the employer virtually admitted that the employee's protected activity was the reason for the assignment. Id. at 672. In *Acme Steel Partition Co.*, 312 NLRB 261 (1993), an employer required an employee to turn in his beeper and call the office every hour. In finding such action to be discriminatory, the Board found that the employer was aware of the employee's failure to respond to his beeper prior to joining the union, but took no action until shortly after learning the employee was a union supporter. Id. at 266. In both of these cases, the employers were unable to come forth with a substantial business justification to rebut the prima facie case. In the instant case, as I explained above, the Respondent has produced sufficient evidence to rebut the prima facie case of the Acting General Counsel. Accordingly I find that the Respondent did not violate Section 8(a)(4), (3), and (1) of the Act with respect to the work assignments made to Ivery and I therefore dismiss this allegation of the complaint.

The Allegation Regarding Closer Supervision

As amended at the hearing, paragraph 8(B) of the complaint alleges that since about October 1, 2010, and on various dates thereafter, including November 1, 2010, the Respondent engaged in closer supervision of Ivery and otherwise harassed him by communicating with him in a hostile manner.

In support of this allegation, the Acting General Counsel again relies solely on the testimony of Ivery. Ivery's testimony in support of this allegation was vague and generalized regarding harassing or hostile communications by supervisors. In this connection, Ivery testified that approximately 2 weeks before he testified at the first trial in October 2010, he began to be treated differently by his supervisors. Specifically when asked how he was treated differently, Ivery responded:

> They were following me around when I got there, talking to me bad. But if I asked them a question, you know, it was like they told me not to worry about it, it's just, you know, just like disrespectful (Tr. 157).

Beyond this vague claim, the record does not contain any specific examples of harassing or hostile communications with Ivery by any of his supervisors.

Ivery further testified that when he returned to work on October 25, 2010, after his testimony at the first trial, both Jordan and Long followed him around. Specifically, Ivery testified that when he reported for work on October 25, 2010, he was given an assignment to develop a machine by Jordan. After about 15 or 20 minutes, Jordan returned to where Ivery was working and asked him how long it was going to take him to do that job. Ivery testified that it normally takes a couple of hours to develop a machine. According to Ivery, prior to testifying at the first trial, Jordan would speak to him when he was assigned a job in the morning and then again throughout the day when Jordan would have occasion to get him another assignment. When asked on direct examination if Jordan would regularly ask him how long a job would take, Ivery responded that he would. When Ivery was asked if that was before or after he testified, he responded, "Pretty much after I testified." (Tr. 170–171.) On cross-examination, however, Ivery acknowledged that it was reasonable for Jordan to check with him regarding the status of an assignment for purposes of scheduling later assignments (Tr. 219–220).

Jordan admitted that he checks with Ivery on a daily basis regarding the status of jobs that he has been assigned. Jordan is responsible for ascertaining the status of jobs and, at times, reassigning employees because of production demands. Jordan testified, without contradiction, that his conversations with other employees regarding the status of jobs are no different than those he had with Ivery. Jordan specifically denied that he gave any closer supervision to Ivery as opposed to any other employee since October 1, 2010.

Long also denied that he engaged in closer supervision of Ivery since October 1, 2010. He admitted that he would often check with Ivery on the status of his assignments. Long explained that Ivery may have been assigned two or three tasks in order of priority, but the priorities may change, so it is important for Long to know the status of all the ongoing assignments,

including Ivery's, in order to properly reassign employees in order to meet production demands.

I credit the testimony of both Long and Jordan regarding the manner in which Ivery was supervised since October 1, 2010. Their testimony was plausible and more consistent than the generalized testimony of Ivery regarding the manner in which he was supervised during the time material to the complaint.

Based on the above, I find that the Acting General Counsel has not established the allegations of paragraph 8(B) of the complaint. The evidence convinces me that the supervision of Ivery by Long and Jordan since October 1, 2010, was no different than their supervision of other employees. The record as a whole establishes that employees, including Ivery, are given multiple assignments throughout the day and that those assignments are often subject to change. The evidence establishes that context by Long and Jordan with Ivery regarding his work assignments were done in the normal course of business and were not based on a discriminatory or retaliatory motive. I find that the Respondent has produced sufficient evidence to rebut the prima facie case presented by the Acting General Counsel. Accordingly, I find that the Respondent has not violated Section 8(a)(4), (3), and (1) of the Act as alleged in paragraph 8(B) of the complaint and I therefore dismiss that allegation.

The November 1, 2010, Warning Regarding Training Pay

As amended at the hearing, a portion of paragraph 8(c) of the complaint alleges that a verbal warning given to Ivery on November 1, 2010, violated Section 8(a)(4), (3), and (1) of the Act. This allegation involves a written verbal warning given to Ivery for allegedly incorrectly recording his training pay hours while he was training employee Michael Williams regarding setups on October 27 and 28, 2010.

The Respondent's policy is to pay employees $.50 more an hour when they are training other employees. On October 12, 2010, Peninsula Plant Manager Brian Lennon posted the following memo at the plant:[5]

> 10/12/10
>
> All,
> A reminder:
>
> Moving forward, If you are training an employee for a new position you need to write ***"training***" and the amount of training hours on your timecard to receive training pay period. (Emphasis in the original)
>
> Thank you,
> Management

According to Ivery, he spoke to Lennon in October 2010 about how to account for his training hours. Lennon told Ivery to put "training" and the number of hours on his timecard. Ivery also testified that he spoke to Michael Jordan, his immediate supervisor, who told him to just put "training" on his timecard.

On October 27 and 28, 2010, Ivery was engaged in some training with employee Michael Williams on setups. On his October 27, 2010 timecard, Ivery wrote "Train 8 hrs" (R. Exh. 61).

On his October 28, 2010, timecard Ivory wrote "Train 6 hrs." (R. Exh. 61). Ivory testified at the trial that his timecards accurately reflected the number of hours he was engaged in training on those dates.

Jordan is responsible for reviewing employee timecards. When he reviewed Ivery's timecard for October 27, Jordan noticed that Ivery had written down that he had been engaged in training for 8 hours. Jordan testified that he assigned Ivory to change a "shot tip" on a machine and that for the 1 hour that he was working on that job, Ivery was not engaged in training. This job is, in fact, reflected on Ivery's timecard for that date. Thus, according to Jordan, there was 7 hours of training on that day. When Jordan reported this discrepancy to Lennon, Lennon directed Jordan to monitor Ivery's training activity on October 28.

With respect to October 28, Jordan testified that he had transferred Williams from training with Ivery to another job at approximately 10 a.m. Thus, the amount of training hours that Ivery was entitled to was approximately 3-1/4 hours.

Jordan took Ivery's timecards for October 27 and 28 to Lennon who reviewed them and discussed the matter with Jordan. Lennon testified he also reviewed the available timecards of Williams for those dates. The record establishes that Williams turned in a timecard dated October 28 (GC Exh. 35) but he did not submit one dated October 27, 2010. There are, however, two timecards for Williams dated October 26 (GC Exhs.35 and 36).

Based on Jordan's report regarding the actual hours that Ivery spent training Williams on October 27 and 28 and his review of Ivery's and Williams'timecards, Lennon decided to give Ivery a verbal written warning regarding his training pay claims for those two dates. The verbal written warning dated November 1, 2010 (GC Exh. 28), indicates the following:

> 1. On Thursday 10/28 Jerome documented 6 hours of training on his timecard, but was moved off of training Mike Williams at 10:15 AM. Should have been 3.25 hours.
>
> 2. On Wednesday 10/27 Jerome documented 8 hours of training on his timecard was changing a shot tip the last hour of the shift. Should have been 7 hours.

Lennon gave the warning to Ivery in a meeting with him held on November 1, 2010. Hicks also attended the meeting. When Lennon informed Ivery that he had only trained Williams for approximately 3.25 hours on October 28, Ivery protested and claimed that he had worked with Williams for about 6 hours. Lennon indicated to Ivery that he was relying on Jordan's report that he had transferred Williams to another job at approximately 10:15 a.m. During this meeting, which was recorded by Hicks, Lennon informed Ivery that on Friday, October 29, 2010, Ivery had actually performed 8 hours of training with Williams, according to a report by Jordan, but that Ivery had neglected to indicate any training hours on its timecard. When

[5] I do not credit Ivery's testimony that the memo was not posted until after he received his November 1, 2010 warning. The memo is dated October 12, 2010, and I credit the mutually corroborative testimony of Lennon and human resources administrator, Douglas Hicks, that it was posted on that date. Ivery was somewhat hesitant regarding this portion of his testimony and I find it implausible that the Respondent delayed in posting this memo until after Ivory received his warning.

Lennon asked Ivery to properly fill out the October 29, 2010 timecard, Ivery refused, apparently upset over the warning that had been given to him for improperly filling out his timecards on October 27 and 28. Lennon then wrote 8 hours training on Ivery's timecard for October 29 so that Ivery would be properly paid.[6]

There is no evidence that other employees have been disciplined for improperly recording the time they spent training on their timecards. There is also no evidence, however, that employees who may have improperly filled out timecards, with the Respondent's knowledge, have not been disciplined.

As I have indicated at the outset of the discussion regarding the allegations involving Ivery, the evidence establishes that the Acting General Counsel has established a prima facie case. In this regard, the Acting General Counsel asserts that the timing of the written verbal warning issued to Ivery on November 1, 2010, shortly after he gave adverse testimony against the Respondent at the first trial, supports a finding that the warning was discriminatorily motivated. Although the timing of the discipline raises suspicion as it occurred shortly after Ivery's adverse testimony in the first trial, I have concluded, after a careful review of all the evidence, that the Respondent has established that Ivery's support for the Union and his adverse testimony are not the reasons he was issued the warning. Rather, I am convinced that the Respondent issued the warning because of its legitimate concern that Ivery had improperly filled out his timecards on October 27 and 28, claiming training pay which he was not entitled to under the Respondent's policy. In reaching this conclusion I note that on October 12, 2010, Lennon posted a reminder to employees indicating that an employee training another employee for a new position was required to write "training" and "the amount of training hours" on his or her timecard in order to receive training pay. Thus, the Respondent specifically advised employees they must put the number of training hours on the timecard. In this regard, Ivery admitted that when he spoke to Lennon about how to record training time, Lennon told him to put the number of hours spent on training on his timecard.[7]

In my view, Lennon reasonably relied on the report of Jordan that Ivery performed the job of changing a tip on the machine for the last hour of his shift rather than training Williams on October 27. Lennon also reasonably relied on Jordan's report that he had transferred Williams to another task at 10:15 a.m. on October 28.[8]

If Lennon wanted to retaliate against Ivery for his union activity and adverse testimony at the first trial, I do not believe he would have ensured that Ivery was properly paid for the 8 hours of training he was engaged in on October 29, even though Ivery refused to fill out his timecard properly for that date. Finally, I note that there is no evidence that the Respondent has ever condoned employees claiming training pay that they were not entitled to. On the basis of the foregoing, I find that the Respondent issued a verbal written warning on November 1, 2010, to Ivery because of his inaccurate claim for training pay and that the warning was not discriminatorily motivated. Accordingly, I find that the warning did not violate Section 8 (a)(4), (3), and (1) of the Act and I therefore dismiss this portion of paragraph 8(C) of the complaint.

The Alleged *Weingarten* Violation

As amended at the hearing, a portion of paragraph 8(C) of the complaint alleges that Ivery was denied his right to have union representation during an investigatory interview on November 1, 2010. The Acting General Counsel claims that after Ivery was disciplined for his violation of the training pay policy, the Respondent began an investigatory interview without affording Ivery a union representative, after he had requested one.[9]

The Respondent contends that there was no violation of Ivery's Section 7 rights regarding the second part of the meeting because it was not an investigatory interview. Rather, the Respondent contends that the conversation between Lennon and Ivery was to review with Ivery his job classification and the scope of his duties.

As I have indicated above, the meeting held on November 1, 2010, between Lennon, Hicks, and Ivery was recorded (GC Exh. 26) and a transcript was made of the recording (GC Exh. 27). The facts set forth below are based upon the recording and the transcript.

After discussing with Ivery the written verbal warning he had been given for violating the training pay policy, Lennon

[6] Lennon's testimony regarding the steps he had taken to ensure that Ivery would be properly paid for October 29 is verified by the transcript of the audio recording of the meeting held on November 1, 2010. (GC Exh. 27,pp. 7–8.)

[7] I do not credit Ivery's testimony that Jordan just told him to put "training" on the timecard because Ivery did, in fact, put down a specific number of hours on this timecard. I find, however, that the number of hours he claimed was incorrect

[8] I credit Jordan's testimony that the last hour of Ivery's shift on October 27 was spent changing a tip on a machine and did not involve training Williams. I also credit his testimony that he transferred Williams from training on setups with Ivery to another task at approximately 10:15 a.m. on October 28. His recall of the events was specific and his demeanor was confident and forthright regarding this portion of his testimony. His testimony regarding October 27 is corroborated by Ivery's timecard. With respect to October 28, I do not agree with the Acting General Counsel's argument that the timecards of both Ivery and Williams supports Ivery's testimony that he trained Williams for 6 hours on that date. The Acting General Counsel argues that because Williams' timecard for October 28 (GC Exh. 35) reflects that he worked on Die No. 2138-14 for 4-1/2 hours and that Ivery's timecard for that date indicates he also worked on the same die, I should credit Ivery's testimony. In the first instance, there is no dispute that Ivery trained Williams on October 28. The dispute centers on the length of time such training occurred. I am reluctant to rely on Williams' timecard to establish the length of time because Williams apparently has a tendency to be inaccurate on his timecards since he submitted two timecards dated October 26 and none for October 27. Moreover, even if the information on the timecard was accurate, it does not support Ivery's claim that he trained Williams for 6 hours. As noted above, I rely on Jordan's clear and concise testimony that Ivery's training of Williams on October 28 lasted approximately 3-1/4 hours and not 6.

[9] Since the initial part of the meeting on November 1 involved the imposition of discipline to Ivery for his violation of the training pay policy and was not an investigatory interview, the Acting General Counsel does not allege a *Weingarten* violation with respect to that portion of the meeting.

indicated there was one other thing that he wanted to discuss involving Michael Jordan, Ivery's supervisor. Ivery then asked if he needed "to get somebody else in here." Lennon responded, "[N]o," but Ivory asked again if he needed "to get somebody else in here" as he had just been written up for something that he did not understand. Lennon did not directly respond to Ivery's second request but proceeded to tell Ivery that Jordan had approached him and stated that Ivery had been asking Jordan how long he would be doing setups. Lennon asked Ivory why he kept "insinuating" that he was being assigned jobs that are outside his job responsibilities. Lennon then showed Ivery his job description and stated that he was not being asked to do anything that was outside of his job description. Lennon indicated that Ivery was showing "the kinds of traits that had got you into trouble in the past." When Lennon told Ivery that he did not know if Ivery was upset about something, Ivery replied that he was not. Lennon then repeated, "A lot of these traits that have gotten you in trouble in the past are creeping up again, alright."

Ivery asked what he was doing that was getting him in trouble. Lennon responded by telling Ivery, "You going, you're basically going to your supervisor and saying you got me doing a job that I shouldn't be doing." When Ivery responded that he had only asked Jordan how long he was going to have him on setups, Lennon asked, "Why does it matter, I mean what, why-why are you always questioning what you're doing at that given time as if we are doing it to single you out." When Ivery asked Lennon if he was in trouble because he "asked a guy a question," Lennon again repeated that he saw some things that Ivery had not done in awhile "that are starting to creep up again and that have gotten you in trouble in the past." Ivery responded that "the only thing you're saying is that, you know, I'm doing some things in the past that got me in trouble because I asked my question. Okay, in the past me and Mike have gotten into some arguments and stuff like that you know. Brian, I ain't doing no stuff like that and you know I'm not." The meeting ended shortly thereafter and Ivery received no discipline as a result of this portion of the meeting.

In *NLRB v. J. Weingarten,* 420 U.S. 251 (1975), the Supreme Court held that an employer violates Section 8(a)(1) of the Act when it denies an employee's request that a union representative be present at an interview which the employee reasonably believes may result in discipline.

In the instant case, after giving Ivery a warning for violating the Respondent's training pay policy, Lennon told Ivery that he wanted to discuss an issue involving Michael Jordan, Ivery's immediate supervisor. At that point, Ivery asked twice if he "needed to get somebody else in here" because he had just been given a warning for something he did not understand. Lennon responded "no" to Ivery's first request; disregarded the second and then proceeded to discuss with Ivery the manner in which he had been questioning Jordan about his job assignments.

The first issue to be addressed is whether Ivery's question to Lennon regarding whether he "needed to get somebody else in here" is sufficient to be construed as a request for union representation. I find that it is. In *Southwestern Bell Telephone Co*., 227 NLRB 1223 (1977), the Board held that when an employee asked the supervisor who was interviewing him "I would like to have someone there that could explain to me what was happening," it was sufficient to invoke the right to representation under *Weingarten*. In *Circuit-Wise, Inc*., 308 NLRB 1091, 1108–1109 (1992), an employee's request for "someone" to be present during an interview was sufficient to invoke the *Weingarten* right when his supervisor admitted that he assumed that the employee was requesting the presence of a union steward. Based on the foregoing, I am satisfied that Ivery's statement to Lennon was sufficient to constitute a request for union representation. While Lennon did not expressly admit that he construed Ivery's statement as a request for such representation, considering all the circumstances, I draw the inference that Lennon was aware that Ivery was requesting union representation.

I also find that, viewed objectively, Ivery had a reasonable belief that Lennon's desire to discuss with him issues that had arisen between himself and Jordan could lead to discipline. In this connection, Ivery had just been disciplined for violating the training pay policy. In addition, Ivery admitted that he had argued with Jordan in the past. Moreover, during the interview Lennon did not allay any concerns Ivery may have had about discussing issues regarding Jordan as he never indicated to Ivery that no discipline was being considered. During the interview, Lennon did ask questions of Ivery as to why he was "insinuating" he was being assigned jobs outside his area of responsibility. Lennon also inquired whether Ivery was upset about anything and later asked Ivery why he was always questioning his job assignments. Thus, the interview was, in fact, investigatory in nature.

The Board has found that employees have a right to a *Weingarten* representative, based on a reasonable belief of possible discipline, when an employer has interviewed employees with a history of work performance issues and conflicts with supervisors. See *Circuit-Wise, Inc*., supra at 1108–1109; *Lennox Industries,* 244 NLRB 607, 608–609 (1979), enfd. 637 F.2d 340 (5th Cir. 1981); *Van Tran Electric Corp*., 218 NLRB 43 (1975). In the instant case, Ivery has some history of work performance issues and has had previous conflicts with Jordan.

I find *Northwest Engineering Co*., 265 NLRB 190 (1982), relied on by the Respondent, to be distinguishable. There, the employer's supervisor, Kapla, observed what he considered to be an intentional work slowdown by employees. Later that day, Kapla scheduled a meeting with employees. When an employee asked what the meeting was about and if he could have a union steward there, Kapla informed the employee that a shop steward would not be necessary. At the meeting Kapla passed out copies of the plant rules and began to read them and give examples of violations. When Kapla reached the section dealing with the willful hampering of production, he referred to the slowdown he observed and identified an employee that, in his view, was guilty of a violation of that rule. Under those circumstances, the Board found that there was no right to a union representative under *Weingarten.* The Board noted that at the meeting the employer read the plant rules and cited examples of rules infractions. The Board found that there was no evidence that the purpose of the meeting was investigatory and specifically noted that no questions were asked of anyone.

As I indicated above the facts in this case establish that the interview of Ivery was investigatory in nature as a number of questions were asked of him regarding his recent interactions with Jordan over work assignments. On the basis of the foregoing, I conclude that the Respondent violated Section 8(a)(1) of the Act by denying Ivery's request to have a union representative present before conducting an investigatory interview that Ivery reasonably believed could lead to discipline.

The December 9, 2010 Warning Regarding Lockout/Tag Out

In the prior decision in *General Die Casters*, supra, I found that the Respondent's safety coordinator, Daniel Owens, conducted a lockout/tag out safety meeting with the Respondent's employees in 2009. At this meeting, Owens reviewed new safety procedures and stated that employees would be disciplined if they failed to follow the safety procedures he outlined. Id. at slip op. pp, 63–64. The safety procedures that the Respondent applies regarding lockout/tag out are utilized on the Respondent's die cast machines and are regulated by OSHA. These machines have between 600 to 1000 tons of force when the die closes. The area between the die halves is referred to as the die space area. When a machine is locked out it cannot be operated.[10] If a machine is not properly locked out and the die closes while an employee is working in the die space area, amputation of a hand or arm or even death could occur. At some undetermined time in the past, an employee suffered a fatal accident at the plant when a machine was not properly locked out.

Ivery received a written warning from Lennon on December 8, 2010, for violating the Respondent's lockout policy (GC Exh. 29). The warning stated:

> Violation: Safety
>
> 1. On 12/7/10 Mike Jordan witnessed Jerome Ivery on DCM 2 in between the die halves hanging a die heater without the safety ratchet or the power to the machine locked out.

Lennon, Ivery, and Hicks attended a brief meeting in which Ivory was given the warning. Hicks made an audio recording of the meeting. A transcript of the recording was entered into evidence by stipulation (GC Exh. 25). According to the transcript, at the meeting Lennon told Ivery that he knew as well as anyone that he had to have the machine locked out. Lennon also stated that Ivery could use the air ratchet or he could shut off the power to the machine but that Ivery had not done either. Lennon also said that he was getting frustrated with the fact that the Union had called OSHA in, complaining that the plant was an unsafe place to work, and then Ivery did not follow the lockout procedure. Lennon also noted that he had given a warning to Leonard Redd for not driving his towmotor safely. Lennon concluded by saying if "you guys" are going to make claims that "this is an unsafe place to work we expect everybody to reciprocate and work in a safe manner also."

Ivory testified that on December 7, 2010, he locked out the die cast machine with an air ratchet when he hung the die heater and that he removed the lock only after the heater had been hung. According to Ivery, after he had taken the lock off the machine, Jordan approached him and told Ivery that he was supposed to have the machine locked out. Ivery told Jordan that he had just removed his lock.

At the hearing, Ivery admitted that he attended the lockout/tag out training conducted by the Respondent's safety coordinator, Daniel Owens. He did not recall Owens stating at that meeting that a die cast machine had to be locked out when putting in a die heater, but he did recall after that meeting that Jordan had informed the setup employees that they had to have a machine locked out when they installed a die heater.[11]

Jordan's testimony regarding this incident conflicts with that of Ivery. According to Jordan, on December 7, 2010, he assigned Ivery to check the lock overpressure and install a die heater in die cast machine 2. Jordan explained that a die heater is an electric heater that goes between the die faces and assists in heating the die. When Jordan came back to machine 2, Ivery was in between the die halves and the safety ratchet was not locked out and the power to the machine was also not locked out (Tr. 450). Jordan told Ivery that this is a safety issue and that the machine needed to be locked out. Ivery did not respond. A couple of minutes later, Ivery called Jordan over to the back of the machine and asked Jordan, "What if the power was locked out." Jordan told Ivery the power was shut off but that it was not locked out. Jordan also told Ivery that it would have been okay if the power was locked out, but it was not locked out earlier when Jordan had observed Ivery working inside that die space.

Jordan reported this incident to Lennon and also wrote a brief report (R. Exh. 6). This report indicates:

> I told Jerome Ivery after checking lock over to put a die heater in. When I walked back through in way of DCM and Trim machine Jerome was in between the cast die put (sic) in a heater and hanger with no lock on safety ratchet. I told him he must have the lock on before going into machine. Then about a minute later he called me back over and said what if the power supply is locked out I said it was not off and now is and it is still not locked out!

I credit Jordan's testimony over Ivery's regarding the events of December 7. Jordan's testimony was detailed and his demeanor regarding this issue was impressive as he testified in a forthright and confident manner. In addition, his testimony was consistent with a contemporaneous report of the incident that he wrote on the day that it occurred. Ivery's testimony was not as detailed and complete and I was not impressed with his demeanor.

Based on Jordan's credited testimony, I find Ivery was in fact working in the die space area between the die halves without the machine being locked out on December 7, 2010. The record establishes that the Respondent has consistently disci-

[10] The term tag out refers to a procedure whereby an employee hangs pay tag on a machine advising others that work is being performed and the machine should not be started.

[11] A report written by Jordan on March 12, 2010, confirms that Jordan specifically advised both Ivory and Marshall Hamric that a die cast machine must be locked out when a die heater is being hung.

plined employees for failing to lock out a die cast machine while working in the die space area. In this connection, the Respondent has issued discipline to the following employees: Charles Cooper-notice of violation of safety rules for being in between the die halves without the machine locked out-March 26, 2001 (R. Exh. 10); Tim Harbison-verbal written warning for failure to follow lockout/tag out-December 8, 2008 (R. Exh. 11); Michelle Poteete-written warning for failure to follow lockout/tag out procedure-December 8, 2008 (R. Exh. 12); John Norton-verbal warning for bypassing guard-February 12, 2009 (R. Exh.13); Marshall Hamric-verbal written warning for failure to lock out a machine while performing a set up-July 14, 2009 (R. Exh. 15); Charles Cooper-verbal written warning for failure to lock out the machine while performing a setup-July 14, 2009 (R. Exh. 16); Dennis Ormsby-final written warning regarding safety for tightening the "shot tip" on the machine without the machine being locked out-July 17, 2009 (R. Exhs. 17 and 18); Dennis Ormsby-notice of termination for, inter alia, not following lockout/tag out procedures-February 22, 2010 (R. Exh. 19); Jess Kreinbrook-verbal warning for cleaning the die face without locking out-May 1, 2010 (R. Exh. 20); Pat Howman-written warning for reaching into molten metal ladle area-September 17, 2010 (R. Exh.21); Charles Cooper-verbal written warning for removing stock part without locking out-January 6, 2011 (R. Exh. 22); Michael Jordan-verbal written warning for working in die space without properly locking out-January 27, 2011 (R. Exh.23); Dave Miller-3-day suspension for failure to lockout/tag out with two previous infractions in 2010-February 18, 2011 (R. Exh. 24); Dennis Lemon-verbal written warning for working between dies without lockout-March 8, 2011 (R. Exhs. 25 and 26).

The Acting General Counsel contends that Ivery's testimony establishes evidence of disparate treatment. Ivery testified that on December 17, 2010, he observed Donald Miller, the first shift maintenance supervisor, working on die cast machine 2. According to Ivery, Miller was "in the machine" without the machine being locked out. Ivery reported this to Jordan who told him not to worry about it. Miller testified that as a maintenance man he never works between the die halves, he only performs work on the machine itself, such as the hydraulic lines and electrical systems. Miller explained that tool and die employees perform repair work inside the die halves. Miller indicated that he does lock out machines to perform certain electrical or hydraulic repairs, but he did not have a specific recollection of working on die cast machine 2 in early December 2010. I credit Miller's testimony that he does not perform work inside the die halves. He testified in a detailed manner and was consistent on both direct and cross-examination. His testimonial demeanor reflected certainty with regard to the events he described. Accordingly, I do not credit Ivery's testimony that Miller was working in between the die halves on machine number 2 in early December 2010.

Ivery also testified that on October 27, 2010, Long and Jordan were working on the "shot arm" on die cast machine 15 without it being locked out.[12] Long and Jordan both testified that they were merely observing the shot arm of the machine to determine why it was wearing out tips. Long and Jordan were not working on the machine but were merely observing its operation in order to determine the nature of the problem. Long testified that neither he nor Jordan had their hands or arms in the shot arm area. Long further explained that if an employee was changing tip on a shot arm, or cleaning something out of that area, the machine would have to be locked out, but that is not what they were doing that day.

I credit the testimony of Long and Jordan regarding this incident as it is more detailed and gives a much more complete description of what occurred on that occasion rather than Ivery's passing and casual observation of what Long and Jordan were doing.

Based on the foregoing, I find that the Respondent has rebutted the prima facie case presented by the Acting General Counsel. In assessing this allegation under *Wright Line,* I have consider not only the factors set forth at the outset of the discussion regarding the allegations regarding Ivery, but also the fact that Lennon made mention of his frustration regarding the Union's request that OSHA investigate the Respondent's safety practices. The critical fact is, however, that the Respondent's consistent practice of disciplining employees, and supervisors for that matter, who violated the rules regarding the lockout of machines, establishes that the Respondent did not treat Ivery differently than any other employee in the application of this important safety policy. As I have noted above, the Acting General Counsel was unable to present any credible evidence establishing disparate treatment of Ivery. Accordingly, I find that the Respondent did not violate Section 8 (a)(4), (3), and (1) of the Act in issuing a disciplinary warning to Ivery regarding his violation of the lockout policy on December 9, 2010.

The Alleged Threat Made to Ivery

Paragraph 7 of the complaint alleges that about December 17, 2010, at its Peninsula facility , the Respondent, through Michael Jordan, threatened employees with disciplinary action and/or discharge because of their union and/or protected concerted activity and/or because they gave testimony before the Board.

In support of this allegation, Ivery testified that at the end of his shift on December 17, 2010, Jordan walked by him and said, "[Y]ou're next." Moments later as Ivery entered the locker room he learned that union supporter Mark Albright had just been suspended. Albright, like Ivery, had testified adversely to the Respondent at the first trial. On cross-examination, Ivery testified that Jordan statement to him lasted approximately 2 seconds (Tr. 233).

Jordan denied that he told Ivery "you're next" on December 17, 2010. Jordan testified that he did speak to Ivery at the end of his shift regarding die cast machine 10 as they were having trouble with the machine making a "fast" shot. According to Jordan, he asked Ivery about the status of the machine and Ivery responded the machine was now operating properly (Tr. 476). Jordan testified at the conversation lasted probably less than a minute but was certainly longer than 2 seconds.

A videotape introduced into evidence by the Respondent (R. Exh. 65) demonstrates that Ivery and Jordan spoke as the first

[12] The "shot arm" is the area of the die cast machine where metal gets injected into the die.

shift was ending for approximately 45 to 50 seconds. After the conversation ended, the videotape shows Jordan walking to machine 10 to check its status. I credit Jordan's testimony over Ivery's with respect to this incident as it is corroborated by the events depicted on the videotape. Accordingly, I find that the Respondent did not violate Section (a)(1) of the Act as alleged in paragraph 7 of the complaint and I shall dismiss that allegation.

Placing Leonard Redd on 6 Months Probation

Paragraph 10 of the complaint alleges that the Respondent violated Section 8(a)(4), (3), and (1) of the Act by placing Leonard Redd on a 6-month probationary period on November 12, 2010.

Leonard Redd is a long-term employee of the Respondent, having worked there for 32 years. Presently he works at the Peninsula plant as a "metal man" and towmotor operator. Redd is an open union supporter; he wears a Teamster hat to work and has worn union buttons reflecting his support for the Union. He testified in the first General Die Casters trial on November 9, 2010, adversely to the Respondent.

According to Redd, approximately 1 week prior to his testimony on November 9, 2010, he informed Long that he was going to testify on that date and asked to take a vacation day for that date. On November 10, 2010, the day after his testimony, Redd clocked in at 7 a.m. After clocking in he spoke to Long and confirmed that he could take a vacation day for November 9. He then went to Jordan's office and gave him a copy of his subpoena and told him that he had been in court the day before.[13]

On November 12, 2010, Redd was placed on probation for 6 months by Lennon for an alleged safety violation that occurred on November 10, 2010 (GC Exh. 5). The probation notice indicated:

> Violation: Safety
>
> 1. On Wednesday morning 11/10/10 Mike Jordan noticed Leonard moving the towmotor backwards while standing beside the towmotor. Mike asked Leonard why he did this when he warned him about doing the same thing approximately 2 weeks prior. Leonard denied moving the towmotor. Mike told him he saw that it moved. Leonard said it must have drifted back The towmotor movement was verified on the video security cameras. Mike Jordan verified the towmotor would not move if the brake was properly applied.
>
> Prior Violations: Safety
>
> 1. 06-16-2010-Written warning for not wearing your seatbelt on the towmotor.
> 2. Also 05/05, 03/05, 03/04 for the same.

Redd was also given a corrective action form (GC Exh. 9) which reflected he was being placed on probation for the unsafe operation of the towmotor. This document contained an identical statement of fact as set forth above in General Counsel's Exhibit 5. It also included as an objective "Do not operate towmotor controls when you are dismounted from the towmotor. OSHA 1910. 178 m) 5 (iii)."

Redd's duties as a towmotor operator include checking to see if the diecast machines need more molten aluminum. He also transports excess aluminum in hoppers that operators fill with aluminum scrap pieces that are byproducts of the casting process. Redd picks up the hoppers with the towmotor and takes them to an aluminum barrel furnace. He drops the aluminum scrap in the hopper into the furnace in order for it to be remelted. Redd testified that when he pulls up to the aluminum furnace he has to get off the towmotor and release a lever on the hopper, which is spring-loaded, in order to empty the contents of hopper into the furnace. Redd explained that at times he has to shake the hopper with the towmotor control levers in order to get all of the scrap pieces out of the hopper. Redd testified that when he lowers the hopper to empty it, sometimes the towmotor will move (Tr. 94–96).

Redd testified that Jordan approached him on November 10 after he had emptied the contents of a hopper into the furnace. According to Redd, Jordan told him that he had seen the towmotor moving. Redd denied that it had moved but Jordan insisted that it had.

Jordan testified that on November 10, 2010, he observed Redd dumping the hopper into the aluminum furnace. According to Jordan, Redd was standing on the right side of the towmotor when Jordan observed the towmotor move in reverse (Tr. 465). Jordan testified that he told Redd that he observed him push the accelerator and put the towmotor in reverse. Redd responded that it must have "drifted" backward. Jordan told Redd that he reached over and pushed the accelerator because the towmotor moved and should not have (Tr. 467). Jordan testified that the towmotor would not move backwards if the safety brake had been applied. On cross-examination, Jordan admitted that he could not see Redd actually push the gas pedal of the towmotor when it moved in reverse (Tr. 483). Jordan also admitted that if the safety brake was not on, if the hopper hit the furnace it would cause the towmotor to move backwards. (Tr. 524–525.)

Jordan testified that 2 weeks prior to November 10, 2010, he observed Leonard Redd standing next to his towmotor when it moved backwards. Jordan testified without contradiction that he informed Redd not to do that as it was an OSHA rule that an employee had to be mounted on a towmotor before it could move in reverse.[14] Jordan reported both the first incident and the November 10, 2010 incident to Lennon.

As noted above, on November 12, 2010, Lennon met with Redd and placed him on probation for the manner in which he operated the towmotor on November 10. At the hearing, on cross-examination, Redd acknowledged that at the November 12 meeting with Lennon, he admitted that Jordan may have seen the towmotor move but that on the date of the incident he did not admit that to Jordan. During the meeting on November

[13] Jordan denied receiving a copy of the subpoena on November 10. I credit Redd on this point as his testimony was detailed and it is plausible that he would inform his immediate supervisor of the specific reason for his absence the day before.

[14] Redd admitted being given such a warning by Jordan, but recalled it being approximately a week before he testified on November 9 as opposed to 2 weeks (Tr. 99).

12, Lennon informed Redd that because of a prior verbal and written warning for failing to wear a seat belt while driving his towmotor, Redd would be placed on 6 months probation.

Lennon testified that he reviewed a videotape of Redd operating his towmotor on November 10 (R. Exh. 66) before deciding to place him on probation. Lennon indicated that the videotape showed the towmotor moving backwards and therefore he knew that Redd had not applied the safety brake (Tr. 539–540).[15] Lennon also testified that Jordan had reported to him that Redd did not have the safety brake applied when he was dumping the hopper into the furnace.

On rebuttal, Redd testified that while he was unloading and subsequently lowering the hopper, the towmotor was in neutral (Tr. 549). He also testified that if the towmotor is in neutral and the safety brake is not applied, the towmotor can move backwards when the hopper is lowered and hits up against the furnace (Tr. 551).

Based on the foregoing, I find that when Redd was lowering the hopper on November 10, 2010, the towmotor was in neutral and the safety brake was not applied. Redd was standing outside the towmotor operating the towmotor control levers to completely empty the hopper. As Redd lowered the hopper, it struck the furnace and the towmotor moved backwards. I find that Redd did not press on the gas pedal from outside the towmotor, in order to cause it to move in reverse.

In assessing the Acting General Counsel's claim that the placement of Redd on probation violated Section 8(a)(4), (3), and (1) of the Act, I find that a prima facie case has been presented. Redd is an open union supporter and the Respondent had knowledge of his union support. In addition, Redd testified adversely against the Respondent at the first trial involving the Respondent on November 9, 2010, the day before he was disciplined. Such timing is often suggestive of a discriminatory motive. In the first *General Die Casters* decision I found that the Respondent committed a number of violations of Section 8(a)(3) and (1) of the Act, demonstrating that the Respondent bears animus against the union activities of its employees. I also considered Lennon's admitted frustration with the Union and its supporters notifying OSHA of alleged safety violations at the Respondent's facilities .Accordingly, the Acting General Counsel has established a prima facie case under *Wright Line*.

The Acting General Counsel also argues that other employees have operated towmotor control levers without being seated on the towmotor and that the Respondent had good reason to be aware of it. In support of this argument the Acting General Counsel relies on Redd's testimony that he observed employees Mark Cooper, Marshall Hamric, David Smerk, and Bill Collins operating the levers on a towmotor without being seated on the towmotor. However, Redd could not recall any of the Respondent's supervisors being present when these incidents occurred (Tr. 147). In addition, during Redd's evaluation meeting with Lennon on February 22, 2011, when Redd told Lennon that he had observed other employees violate the Respondent's rules regarding towmotor operation, Lennon replied that they should not be doing so. Redd responded to Lennon's statement by saying, "I ain't saying nothing, because I figure they'll get caught sooner or later (Tr. 130).

I find that this evidence does not establish that the Respondent had knowledge of other employees violating its towmotor safety rules without taking disciplinary action. As Redd acknowledged there were no supervisors present when he observed other employees improperly operating a towmotor and he explicitly declined an opportunity to notify Lennon regarding these incidents.

Redd also testified that he observed Facilities Manager Matt Burch operating the levers of a towmotor while he was standing outside of the towmotor.[16] Burch testified that in early March 2010 he supervised a job that involved removing the top half of an aluminum furnace in order to clean it out. Burch was directing two employees who were rigging chains that were attached to a boom on the forklift to the top of the furnace. Burch was seated on the towmotor with a seat belt on and the safety brake set. Burch noticed that the chains were twisted around the lifting hook. He got off of the towmotor to explain how the chains should be attached to the boom. He then stood beside the towmotor and puts tension on the chain to make sure that there was equal tension on all four chains. When the chain tension was equal, Burch got back on the towmotor, put on his seat belt and lifted the lid off of the furnace. He took the safety brake off and drove away with the furnace lid to take it to the appropriate location. (Tr. 377–381.)

There are critical distinctions between the incident involving Burch and the November 10, 2010 incident that caused Redd to be suspended. In the first instance, Burch was involved in a complex maneuver involving the specialized maintenance of an aluminum furnace, while Redd was engaged in one of his daily tasks. More importantly, however, Burch had the safety brake engaged when he used the towmotor levers to raise and lower the boom. Redd admitted that he did not have the safety brake engaged when the towmotor began to move backwards while he was dumping the hopper on November 10. Therefore, I do not find the incident involving Burch supports the Acting General Counsel's argument that Redd was treated disparately.

The Respondent contends that Redd was placed on probation on November 12, 2010, because of his history of safety violations. The probation notification refers to prior safety violations, including a June 16, 2010 written warning for not wearing a seat belt on a towmotor and the same violations that occurred in May and March 2005, and March 2004. The suspension notice is incorrect with regard to the June 16, 2010 warning being issued for a failure to wear a seat belt. General Counsel's Exhibit 6 makes it clear that the verbal written warning issued on that date was for attendance.

The Respondent notes, however, Redd's history of other safety violations. In this regard, Redd received a Notice of Violation of Safety Rules and/or Procedures for getting off of the towmotor while it was still moving in violation of an OSHA

[15] The videotape of Redd's operation of the towmotor on November 10, 2010, while not of the best quality, clearly shows the towmotor moving backwards with Redd standing on the right side of it.

[16] Burch testified that as the facilities manager he supervises the maintenance department and is third in command of the Respondent's Peninsula facility after Lennon and Long. I find therefore that he is a supervisor and agent of the Respondent within the meaning of the Act.

regulation on July 29, 2005.[17] On July 6, 2009, Redd was given a written verbal warning for leaving his towmotor parked with its forks in a raised position in violation of an OSHA regulation (R. Exh. 28). On March 15, 2010, Redd received a verbal written warning for operating his towmotor without a seat belt on March 4 and 5, 2010 (R. Exh. 29). On May 5, 2010, he then received a written warning for again not wearing a seat belt while operating a towmotor (R. Exh. 30). As noted previously, approximately 2 weeks prior to the events of November 10, 2010, Redd had been warned by Jordan about moving a towmotor while standing beside it.

At the hearing Lennon testified that an employee's entire personnel file is reviewed before discipline is imposed and that probation is the third step of the Respondents progressive disciplinary system. Since Redd did receive a written warning on May 5, 2010, for not wearing a seat belt, I find that the incorrect reference that he received such a warning on June 16, 2010, in his notice of probation, is attributable to negligence in the review of his file rather than evidence that the Respondent was relying on a pretextual reason to discipline Redd. The Respondent's actions are consistent with its progressive discipline policy which provides for probation at the third step. As noted above, Redd had received a verbal written warning and a written warning in 2010 for towmotor safety violations.

In addition to the history of discipline given to Redd for safety violations, the Respondent also relies on the fact that it has consistently disciplined employees for safety violations involving the operation of the towmotor. In this regard, the Respondent issued warnings to the following employees.: Pierce Griffin-verbal warning for failure to use horn-February 29, 2008 (R. Exh. 33); David Earliwine verbal warning for: failure to use horn to warn pedestrian traffic; failure to look in the direction of traffic, and driving up to a person standing in front of a fixed object-May 4, 2009 (R. Exh. 34); Robert Quarterman-verbal warning for operating a towmotor without a seat belt-March 16, 2010 (R. Exh. 35).

Having considered the foregoing, I conclude that the Respondent has produced sufficient evidence to establish that it placed Redd on probation for legitimate business reasons rather than because of his support for the Union and/or his testimony as a witness on behalf of the Acting General Counsel on November 9, 2010. While the timing of placing Redd on probation the day after his testimony is suggestive of a discriminatory motive, the evidence in this case establishes that Redd, in fact, engaged in a safety violation on November 10, 2010, that warranted him being placed on probation, given his prior safety record. As I have noted above, by operating the lever of the towmotor controlling the hopper while standing outside of the towmotor without the safety brake on, Redd established a condition where the towmotor moved backwards. His actions not only violates the OSHA regulation regarding the use of operator controls while standing outside the towmotor but also the OSHA regulation requiring that the safety brake be engaged if the driver is off the towmotor. Beyond the regulations, it appears reasonable for the Respondent to require adherence to towmotor safety. policies given the fact that Redd was dumping scrap aluminum into an open aluminum furnace. The record establishes that there are certain inherent dangers in the Respondent's production operations and that adherence to safety policies is of the utmost importance.

While it is true that Burch briefly operated towmotor levers while standing outside a towmotor, his situation was out of the ordinary and the safety brake was set, precluding the possibility of the towmotor moving backwards. I find these facts sufficient to distinguish his situation from that of Redd's.

While Redd is a long-term employee, his disciplinary history does indicate a number of safety violations involving the operation of a towmotor. In addition, he was verbally warned by Jordan regarding the same offense (the towmotor moving while he was standing outside of it) 2 weeks before being placed on probation for committing the same offense. Finally, the Respondent has disciplined three other employees for towmotor safety violations. Accordingly, I find that that the Respondent did not place Redd on probation on November 12, 2010, in violation of Section 8(a)(4), (3), and (1) of the Act and therefore I shall dismiss paragraph 10 of the complaint .

The Allegations Regarding Paying the Wages of the Respondent's Employee Witnesses

The facts regarding this issue are essentially undisputed. Employee Sam Tomsello had originally been subpoenaed to testify at the first *General Die Casters* trial in October 2010. After receiving his subpoena, he informed his immediate supervisor, Brian Ohler, that he had been subpoenaed to attend the hearing. Because of a postponement in the hearing, Tomsello testified on November 9, 2010, as a witness for the Acting General Counsel. Approximately a week before his testimony he informed Ohler that he had again been subpoenaed and was scheduled to testify on November 9. At the time of his testimony, Tomsello was a third shift employee at the Peninsula plant and worked from 11 p.m. to 7 a.m.. He worked the third shift on November 8–9 and then appeared and testified at the hearing on the morning of November 9. After testifying on November 9, 2010, Tomsello took the November 9–10 third shift off. Rather than take a vacation day with pay, Tomsello chose to take time off without pay. Tomsello's wage rate at the time was approximately $15 an hour.[18]

On Friday, November 19, 2010, the Respondent called the following third-shift employees as its witnesses: Edward Dickerhoof; Walter Wood; Daniel Pietrocini; David Wiggins; Matthew Gearhart; Frank Kovach; Arthur Diecek; and James Holley. These employees were excused from working the third shift from 11 p.m. on November 18, 2010, to 7 a.m. on November 19 and the Respondent paid those employees as if they

[17] Human Relations Director Hicks authenticated this document as being kept in the regular course of business in Redd's personnel file. While Redd denied that the signature on the document was his, I discredit that testimony. In my view, the signature appears similar to the signatures on other documents that Redd admitted he signed (R. Exhs. 28, 29, and 30). Moreover, I find it implausible that the Respondent would have forged Read signature to a document dated in 2005. After presiding over two trials involving the Respondent, I find no evidence that would suggest that it would forge a document for use at trial.

[18] While the record does not specifically indicate that Tomsello received the appropriate witness fee, as a subpoenaed witness he was, of course, eligible to make a claim which, if made, would have been paid.

had worked the third shift on those dates as a witness fee. The record does not reflect the exact amounts paid to these employees.

The Respondent did not give notice and an opportunity to bargain to the Union before excusing the third-shift employees from work on the night of November 18–19 and paying them their regular wages.

The Acting General Counsel contends that the Respondent violated Section 8(a)(4), (3), and (1) by denying Tomsello the benefit of being excused from the third shift, with pay, the day of his testimony. In support of this argument the Acting General Counsel relies primarily on the Board's decisions in *General Electric Co*., 23 NLRB 683 (1977), and *Electronic Research Co*. (*Electronic Research I),* 187 NLRB 733 (1971). The Acting General Counsel also contends that granting third-shift employees paid time off the night before testifying at an unfair labor practice hearing is an employee benefit and a term and condition of employment that is a mandatory subject of bargaining. The Acting General Counsel asserts that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to give notice and an opportunity to bargain regarding the conditions that would apply to the testimony of third-shift employees at the unfair labor practice hearing.

The Respondent contends that it did not violate Section 8(a)(4), (3), and (1) of the Act by paying employees who testified on its behalf a full day's pay while not providing the same to employees who are subpoenaed by the Acting General Counsel or the Union. The Respondent also contends that the issue of witness compensation is not a mandatory subject of bargaining and consequently it did not violate Section 8(a)(5) and (1) of the Act by failing to give notice and opportunity to bargain over this issue. In support of its position the Respondent also relies primarily on the Board's decision in *General Electric*, supra.

I agree with the parties that the Board's decision in *General Electric* is critical to the resolution of this issue. In *General Electric,* employee Julius Borbely appeared at the hearing as a witness for the General Counsel. Borbely was paid the $20 witness fee, the then applicable rate, for his attendance at the hearing. Borbely was absent from work for the entire day of the hearing and the employer did not pay him his regular daily wage of $46. Employee Andrew Bartko appeared and testified at the same trial on behalf of the employer. The employer compensated Bartko by paying him $86.26, which represented the amount of his wages for 11 hours of work. After the hearing, Borbely requested that the employer pay him the difference between the $20 witness fees he received from the Board and his regular daily wage of $46. The employer denied the request.

In *General Electric,* the General Counsel argued that the employer's conduct violated Section 8(a)(4) and (1) of the Act. The Board found that the employer had not violated the Act and dismissed the complaint. In its decision in *General Electric,* the Board considered two prior cases: *Electronic Research Co. (I*), 187 NLRB 733 (1971), and *Electronic Research Co. (II)*, 190 NLRB 778 (1971). In *Electronic Research I,* the employer denied a perfect attendance incentive award to an employee absent from work because of his testimony at the Board proceeding pursuant to a subpoena issued by the Board. The employer granted the perfect attendance award to employees who appeared at the same hearing pursuant to its request. The Board found that the employer's conduct violated Section 8(a)(4) and (1). In *Electronic Research II,* the Board again found that the employer violated Section 8(a)(4) and (1) of the Act by denying a perfect attendance award to an employee who was absent from work pursuant to a subpoena issued by the General Counsel while granting the same award to employees who appeared at the same hearing at the employer's request. The Board also concluded however that the employer did not violate the Act when it refused to pay for time lost from work by three employees who had been subpoenaed by the union as witnesses at a Board hearing, even though it paid regular wages to employee witnesses it had called. In so finding the Board noted at 778:

> The earlier unfair labor practice proceeding was an adversary one in which each side subpoenaed or called its own witnesses in compensated them for their time. In these circumstances to order Respondent to pay the employees for time lost from work in testifying against it is to require a litigant in effect to subsidize its proponent. In our view, Section 8(a)(4) was never intended by Congress to impose such a burden on the respondent employer.

In *General Electric,* the Board also noted that in reaching opposite results in the two different situations presented in *Electronics Research II* it was not:

> [D]rawing a distinction based on any incidental monetary or other disadvantage which might have resulted. Rather, it was distinguishing between those situations where the employer's actions are directed at the employment relationship as in the perfect attendance award matter therein, and those where they are not, as in the witness fee situation. In the latter instance, the obligation to pay witness fees is imposed by statute or fiat and not by the employment relationship. Whether summoned by an employer, a union, an individual party or the General Counsel, the witnesses must be compensated by "the party at whose instance the witnesses appear," and the minimum amount of such compensation is fixed, as here by the agency under its applicable rule. But there is no prohibition against the party paying its witnesses more than a minimum, or more than another party will pay their witnesses, nor should any adverse inferences be drawn against the party paying the higher amount merely from that fact. In this regard we deem as reasonable a party's use of employee wages as the measure for determining the fee to be paid its witnesses.
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> . . . .
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> Furthermore, the obligation exists only between the party and its witnesses; it does not extend to witnesses called by others. It follows, then, that the witness fee paid by one party is not, nor should it be, a concern or affair of another party. In short no party stands as the guarantor for equal payment to all witnesses summoned by all parties to the proceeding. *A fortiori*, an employer, as here,-or union in a case not involving an employer as a party-is not as a general proposition obligated to pay opposition witnesses anything in connection with witness fees. Consequently, we conclude that an employer is not discriminating with respect to the employment relationship by not paying an employee called as a witness against it the dif-

> ference between what such witness would have earned had he worked and what the party calling him as a witness is willing to pay. Nor do we believe that the failure of the employer to pay such difference to employees testifying against it is otherwise per se discriminatory, as the General Counsel's arguments may suggest. As we have previously stated to hold an employer must pay the difference will result in making employer liability dependent on what others are willing to pay something we are unwilling to do. (Footnotes omitted.)

Applying these principles, I conclude that the Respondent did not violate Section 8(a)(4), (3), and (1) of the Act by not paying Tomasello for the November 9–10 shift that he took off after his testimony on November 9. As *General Electric* makes clear that payment of witnesses is established by "statute or fiat and not by the employment relationship." Id. at 685. Accordingly, there is no obligation on behalf of the Respondent to pay an opposition witness such as Tomsello anything as a witness fee. Thus, the Respondent did nothing discriminatory in excusing its witnesses from the third shift of November 18–19 before they testified and paying them their regular wages and not extending the same offer to Tomsello.

Other than a difference in the manner in which the Respondent paid witness fees, Tomsello was not denied the benefit of a term and condition of employment that witnesses called by the Respondent received. Tomsello elected to take off, without pay, instead of taking a paid vacation day, for the shift that began the evening after his testimony. In this regard, this case is distinguishable from *Western Clinical Laboratory, Inc*., 225 NLRB 725 (1976), enfd. 571 F.2d 457 (9th Cir. 1978), which is relied on by the Acting General Counsel. In that case, an employer required an employee who attended a Board hearing as a subpoenaed witness on behalf of the General Counsel to use his accrued vacation time, when he preferred to take leave without pay. The Board found that the employer's conduct violated Section 8(a)(4), (3), and (1) because it would cause witnesses to be reluctant to testify at Board hearings for fear of the loss of their accrued vacation time. Here, of course, the Respondent imposed no such requirement; rather Tomsello was free to choose time off without pay. Accordingly, on the basis of the foregoing, I find that the Respondent's actions did not violate Section 8(a)(4), (3), and (1) of the Act.

With respect to the Acting General Counsel's contention that the Respondent violated Section 8(a)(5) and (1) by not giving the Union notice and an opportunity to bargain over permitting the employee witnesses it called on November 19 paid time off before they testified, I find that the Respondent had no obligation to bargain over this issue since it does not involve a mandatory subject of bargaining. In *General Electric,* supra, the Board indicated that the payment of witnesses is not "directed at the employment relationship." Id. at 686. I find this can only mean that the payment of witnesses is not a term and condition of employment that requires bargaining. I am not aware of any precedent that mandates that the practices and procedures utilized by parties at an NLRB hearing, including the payment of witness fees, is a matter that the parties are obligated to bargain about. The cases relied on by the Acting General Counsel, *Pepsi America, Inc*., 339 NLRB 986 (2003), and *Verizon New York, Inc*., 339 NLRB 30 (2003), involve unilateral changes regarding paid time off, but not as it relates to the issue of the manner in which a party may compensate its witnesses for attending an NLRB hearing and are thus distinguishable from the instant situation. Accordingly, on the basis of the foregoing, I find that the Respondent has not violated Section 8(a)(5) and (1) of the Act. I shall therefore dismiss paragraph 11 of the complaint.

CONCLUSIONS OF LAW

1. By denying the request of employee Jerome Ivery for union representation during the course of an interview conducted by the Respondent, under circumstances in which, at the time of the request, Ivery had reasonable grounds for fearing that the interview might result in his discipline, the Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

2. The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, General Die Casters, Inc., Peninsula, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requiring any employee to take part in an interview without union representation, if such representation has been requested by the employee and the employee has reasonable grounds to believe that the interview will result in disciplinary action.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilitiesin Peninsula and Twinsburg Ohio, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 8, after

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1, 2010.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 11, 2011.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT require any employee to take part in an interview where the employee has reasonable grounds to believe that the matters to be discussed may result in his/her being the subject of disciplinary action, and where we have refused the employee's request to be represented at such interview by a labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

GENERAL DIE CASTERS, INC.